Supreme Court, U.S.
FILED
09-609 NOV 17 2009
OFFICE OF THE CLERK

146

(1)

No.

IN THE

SUPREME COURT OF THE UNITED STATES

DOUGLAS PITCHER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

JOHN J.E. MARKHAM, II
Counsel of Record
MARKHAM & READ
One Commercial Wharf West
Boston, Massachusetts 02110
(617) 523-6329

Dated: November 17, 2009

QUESTIONS PRESENTED

I. Given this Court's decision in *Massaro v. United States* that direct appeals are not the place to decide ineffective counsel claims (since no adequate record normally exists for such a claim on the direct appeal), and where petitioner in this case made a post-appeal, collateral claim under 28 U.S.C. § 2255 that he was denied effective assistance of counsel, and the district court granted the motion and reduced his sentence from ten years to the six years he had already served, after the district court conducted a detailed evidentiary hearing and issued a 43 – page, published opinion explaining why counsel had been ineffective, should the Second Circuit, in 2009, after *Massaro* was decided (in 2003), have vacated the district court decision (timely made in 2005) by holding that on the direct appeal in 2001 petitioner had waived his right to a post-direct appeal hearing on his ineffective counsel claim because, on that direct appeal, he had made his ineffective counsel claim without a sufficient factual record (asking for a remand to develop the record), and the Second Circuit simply denied the claim on that 2001 direct appeal without any remand for the needed hearing?

II. Does a criminal defendant's protestation of innocence to his trial counsel justify trial counsel's substandard assessment of the risks of going to trial where (1) the defendant faced an automatic, mandatory ten-year sentence if convicted, (2) the government had offered a guilty plea deal with a sentence of several months and (3) the district court's assessment was that the evidence of guilt should have

been obvious to trial counsel despite defendant's declaration of innocence?

TABLE OF CONTENTS

QUESTIONS PRESENTED ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION OF THIS COURT 1

CONSTITUTIONAL AND STATUTORY PROVISONS INVOLVED 2

STATEMENT OF THE CASE 2

Overview 2

The Facts and the Trial 3

Pitcher's 2001 Direct Appeal After Conviction 6

Pitcher's Later-Filed 2255 Proceeding 9

The Government's Appeal of the District Court 2255 Opinion 14

REASONS FOR GRANTING THE WRIT 14

The Decision Below Conflicts with *Massaro* 14

Protestations of Innocence Do Not Lower Counsel's Duty to Offer Reasonable, Competent Advice 16

CONCLUSION 20

APPENDIX ..... *follows Conclusion*

TABLE OF AUTHORITIES

CASES:

Billy-Eko v. United States,
8 F.3d 111 (2d Cir. 1993)..... 6, 7, 8, 9, 13, 14

Boria v. Keene,
99 F.3d 492 (2d Cir. 1996)..... 17, 18

Cullen v. United States,
194 F.3d 401 (2d Cir.1999)..... 19

Massaro v. United States,
538 U.S. 500 (2003) 3, 6, 13, 14, 15

Pitcher v. United States,
371 F.Supp.2d 246 (E.D.N.Y. 2005)..... *passim*

Strickland v. Washington
466 U.S. 668, 104 S.Ct. 2052 (1984) 15

Toro v. Fairman,
940 F2d 1065, 1068 (7th Cir. 1991) 17

United States v. Gordon,
156 F.3d 376 (2d Cir. 1998)..... 17

United States v. Pitcher,
559 F.3d 120 (2d Cir. 2009) ..... *passim*

United States v. Pitcher,
7 Fed.Appx. 119 (2d Cir. 2001) ..... *passim*

CONSTITUTIONAL PROVISIONS, CODES AND RULES:

United States Constitution

Sixth Amendment 2

United States Code

28 U.S.C § 2255..... 2, *passim*

OPINIONS BELOW

The judgment of the Court of Appeals for the Second Circuit denying Douglas Pitcher's Petition for Rehearing en Banc is reproduced in the Appendix ("App.") at App. 1a to 2a. The Second Circuit opinion (which reversed a published decision of the District Court which had granted petitioner's §2255 motion) is published at *United States v. Pitcher*, 559 F.3d 120 (2d Cir. 2009) and reproduced at App 3a to 14a. The District Court decision granting Pitcher's motion to vacate his conviction or alter his sentence under 28 U.S.C. §2255 is published at *Pitcher v. United States*, 371 F.Supp.2d 246 (E.D.N.Y. 2005) (Trager, J.) and is reproduced at App. 15a to 58a. The earlier, Court of Appeals denial of petitioner's direct appeal, published at *United States v. Pitcher*, 7 Fed.Appx. 119, 121, 2001 WL 356941, 1 (2d Cir. 2001) is reproduced at App. 59a to 63a.

JURISDICTION OF THIS COURT

The decision of the Court of Appeals denying petitioner's Petition for a Rehearing and for Rehearing En Banc was entered on August 19, 2009. This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. §1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part that:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

Title 28 U.S.C. §2255 provides in pertinent part that

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States . . . may move the court which imposed the sentence to vacate, set aside or correct the sentence.

STATEMENT OF THE CASE

Overview

If this Court does not intervene, a young man sentenced disproportionately to a ten year sentence in 1998, and released after serving six years in 2005, will be sent back to prison for four years. Pitcher was released in 2005 because he filed a 2255 petition claiming ineffective counsel. On that petition, the District Court held an evidentiary hearing and made

painstaking fact findings that Pitcher's trial counsel had been ineffective when he told Pitcher not to plead guilty and accept a very short sentence, but rather go to trial where he risked a mandatory minimum sentence of ten years and where the evidence of his guilt was strong, on a tape recording no less.

In reversing the District Court and setting the stage for Pitcher's return to prison after fours years as a law-abiding citizen, the Second Circuit ignored the compelling facts found by the District Court at the evidentiary hearing, and the District Court's painstaking explanation of them in its published opinion. It did so by an incorrect procedural ruling at odds with this Court's decision in *Massaro v. United States*, 538 U.S. 500 (2003), which overruled the Second Circuit practice of requiring ineffective counsel claims to be raised on direct appeal or lost, a practice that the Second Circuit treated as still in effect in its decision in this case.

And even if that now-discarded, "make-or-lose" procedure had still been in effect in 2009, some five years after *Massaro*, it had been complied with on Pitcher's 2001 direct appeal. That is why the District Court held a hearing and wrote and published a 43-page opinion explaining his factual conclusions. They should be reinstated for the reasons explained below.

The Facts and the Trial

Petitioner Douglas Pitcher was indicted on May 21, 1998 for conspiracy to import heroin by introducing a courier to a drug dealer, knowing that drug smuggling would occur. The drug dealer had asked Pitcher to act as the courier, go to Peru, and retrieve some heroin. Pitcher declined but introduced the dealer to another, who agreed to act as courier. Pitcher was not to profit from the matter. The courier went to Peru and was apprehended on his return with the drugs. He immediately cooperated with the authorities by placing a recorded telephone call to Pitcher, during which Pitcher's statements clearly revealed his involvement and thus his guilt. The courier received a sentence of time served – the *four days* he was in jail before making the taped telephone call. The drug dealer was later caught and cooperated against others. He received a sentence of 13 months.

Because of his slight involvement, the government also offered a cooperation deal to Pitcher. However, Pitcher's trial attorney strongly urged petitioner to go to trial because, he told Pitcher, the case against him was weak and the lawyer believed Pitcher should reject an offer to cooperate because he could secure an acquittal. He was wrong. The taped conversation between the courier and Pitcher after the courier's return that showed that Pitcher had made the dealer/courier introduction and that Pitcher had known the purpose of the trip – heroin smuggling. It thus implicated Pitcher squarely in the charged conspiracy.

Pitcher took his trial counsel's wrong-headed advice and went to trial. Not surprisingly, on October 16, 1998, Pitcher was convicted. The judge was required under the law to sentence him to the mandatory minimum sentence of ten years.

After Pitcher had served over six years of this sentence, the district court held an evidentiary hearing on Pitcher's timely-filed, 2255 claim that he had not had effective counsel, and found, in a compelling, well reasoned, and published opinion, that Pitcher's counsel had been woefully ineffective in advising him to go to trial in the face of (1) the tape-recorded evidence showing his guilt, (2) the light sentence he would have received had he pleaded guilty, and the mandatory minimum ten year sentence he faced on conviction.. The District Court thus reduced Pitcher's ten year sentence to time served (six years) and set him free in June 2005.

Four years later, in 2009, the Second Circuit reversed, not because it disagreed with the District Court's fact findings, but rather because it held that Pitcher had already made and lost his ineffective counsel claim in 2001 during his direct appeal, and by remarking that Pitcher was unsympathetic since he had professed his innocence to his trial counsel before trial. We show below that this ruling was simply wrong.

Pitcher's 2001 Direct Appeal After Conviction

Pitcher's direct appeal from his conviction and ten-year sentence was taken and decided in 2001, before this Court's decision in *Massaro*, *supra*, 538 U.S. 500 (2003) which held that, normally, ineffective counsel claims should not be raised or resolved on direct appeal since, most times, they require development of facts that are not revealed in the record available on the direct appeal. At the time of Pitcher's appeal however, pre *Massaro*, claims that trial counsel had been ineffective had to be raised on direct appeal or they were lost. *See*, the now-overruled decision in *Billy-Eko v. United States*, 8 F.3d 111, 116 (2d Cir. 1993):

> Even if new appellate counsel determines there is need for further extrinsic evidence, counsel would still be well-advised to err on the side of inclusion [of ineffective assistance of counsel claims] on direct appeal "Including the claim, complete with the attorney's assertion that further factual development is necessary, gives this Court the opportunity to either remand the claim to the district court or leave the defendant to his post-conviction remedies by declining to rule on the claim. . . . . By including the claim on direct appeal with a notation that further factual development is necessary, and thus allowing this Court the opportunity to agree with that notation, *new appellate counsel protects the defendant's claim from procedural bar on collateral attack.*

In a footnote, the *Billy-Eko* Court added that:

> "We expect that there will be few cases in which ineffective assistance claims will be based solely on the record developed at trial, and *we also expect that most defendants bringing such claims on § 2255 motions will not find their claims barred."*

(emphasis added).

Complying with this procedure of "make-it-or-lose-it," Pitcher's appellate attorney thus claimed, as one of several other appellate points, that Pitcher had been ineffectively represented because his trial counsel had advised him not to cooperate with the government. She made the claim to preserve it as *Billy-Eko* required at that time as her opening brief states:

> While this is not a 2255 proceeding, there is enough evidence in this record to conclude that Mr. Pitcher was deprived the effective assistance of counsel. . . . . *In the alternative, this matter should be remanded to the district court for a hearing upon Mr. Pitcher's claim that he was denied his Sixth Amendment right to effective assistance of counsel.*[1]

---

1 (Emphasis added) The relevant portions of Pitcher's briefs are found at Docket No. 00-1222, Docket entry on 8/22/00, Pitcher opening brief at p. 22; Docket entry on 9/27/00, Pitcher reply brief at p.3.

In her reply brief, appellate counsel concluded as follows: "Finally, if this Court finds that Pitcher has not established all the elements to prove that he was deprived of assistance of counsel, this case should be remanded *as the government suggests.*" (*Id.* at p. 3). Clearly, under *Billy-Eko*, 8 F3d at 116, "new appellate counsel protect[ed] the defendant's claim from procedural bar on collateral attack."

On April 10, 2001, the Court of Appeals denied the direct appeal without commenting on the requested remand:

> The government "was interested in trying to sign [Pitcher] up as a cooperator from the beginning, and [this] was made clear to the defendant at the moment of his arrest;" but Pitcher proceeded to trial because, in his words, he "didn't think [he] was guilty" and "thought [he] had a good chance of winning." Any deficiency in counsel's advice on this subject is properly attributable to Pitcher's own dishonesty in dealing with his lawyer; Pitcher's counsel admitted that, "***Had [he] realized ... the truth of what had actually occurred here before we went to trial***, [he] never would have went to trial." *See, e.g., Tyson v. Keane,* 159 F.3d 732, 736-37 (2d Cir.1998) (holding that, ***absent a gross failure to investigate*** defendant's claims, it is not ineffective counsel to rely on defendant's apparently truthful statements when determining trial strategy).

United States v. Pitcher, 7 Fed.Appx. 119, 120-21, 2001 WL 356947 (2d Cir. 2001) (App. 60a).

This holding was made with no evidentiary hearing and based only on the record on appeal.

Pitcher's Later-Filed 2255 Proceeding

Pitcher, thinking that, under *Billy-Eko*, 8 F3d at 116, his "appellate counsel protect[ed] the defendant's claim from procedural bar on collateral attack," filed a timely 2255 claim of ineffective counsel and asked for an evidentiary hearing on the very facts discussed in the highlighted portion of the above-quoted, Second Circuit decision. These were precisely the factual issues prompting appellate counsel to ask for the remand on the earlier-filed, direct appeal. The District Court did hold the hearing at which it heard the full testimony of Pitcher's trial lawyer, the prosecutor, and Pitcher, and considered all this in light of the trial record in the trial over which the District Court had presided. Based on this complete factual presentation, the District Court held that Pitcher's trial lawyer absolutely should have recognized the strength of the government case against Pitcher, and thus that the advice to go to trial was clearly substandard. These findings, were not available absent the evidentiary hearing and thus not available on the direct appeal.

Specifically, the District Court concluded in its opinion issued on May 31, 2005 that Pitcher's trial counsel had been unreasonably optimistic in telling

his client that he could secure his acquittal at trial despite a tape-recorded conversation damning Pitcher as a participant in the conspiracy to import heroin from Peru and despite the ten-year prison risk he would run by going to trial. The court found:

> Jacob's [Pitcher's trial attorney's] testimony, however confirmed petitioner's [Pitcher] claims that Jacob had been highly optimistic to petitioner regarding petitioner's chances at trial.

Pitcher, 371 F.Supp. 2d at 256 (App. 36a), noting that Pitcher's trial attorney testified that:

> THE COURT: What was the rationale about his course of conduct [i.e., going to trial instead of pleading guilty], in your opinion?
>
> ATTY. JACOBS: *Most important Judge, I thought the evidence wasn't there. I thought there was enough to find him not guilty.*
>
> * * *
>
> I felt the transcript was inconsistent with that, that he had any knowledge of the transaction. *If I remember correctly, the transcript was about as strong a piece of evidence as I have seen in the years in the drug cases.* I thought he could be acquitted on that and so did [petitioner] Pitcher.

[JA 400-401] [2] (emphasis added)

Yet the truth was that the case against petitioner Pitcher was anything but weak:

> There can be no conclusion from the above other than that [trial attorney] Jacobs' optimistic assessment of petitioner's chances of victory at trial was unjustified . . .
>
> * * *
>
> Jacobs had many weeks, if not months, to assess the strength of the case against petitioner and the impact of the tape. Moreover, the stakes were enormous. The government was eager for petitioner's cooperation, and in *light of his minor role in the conspiracy*, he had an excellent chance of doing little or no jail time if he cooperated. In contrast, petitioner, if convicted after trial, faced a minimum of ten years. Under these circumstances, there appears to be no reasonable basis upon which a competent defense attorney would have reached the conclusion that petitioner had a "winnable" case, or that the tape was exculpatory as to the conspiracy to possess a controlled substance. Jacobs' advice to petitioner was a constitutionally deficient performance.

---

[2] Numbers in parenthesis following "JA" refer to the Joint Appendix filed with the appeal brief on the government's appeal of the district court's decision on the 2255 motion. They are available at this Court's request.

Pitcher, supra, 371 F.Supp 2d at 261-62 (emphasis added)(App. 49a).

The District Court made various additional findings about the strong case against Pitcher, which support Pitcher's claim that Jacobs improperly misled Pitcher with the assessment that the case could be won at trial. First, the tape-recorded conversation[3] did not support Pitcher's version of events but instead was:

> . . . . highly inculpatory. It confirmed major aspects of Collins' story, which Collins had *already* provided to law enforcement authorities before the tape was made. It confirmed that petitioner had introduced Collins to Mauricio at petitioner's house and that petitioner's "girlfriend" had also made such a trip for Saenz. It showed that petitioner was closely involved with Saenz and was generally familiar – more so than Collins – with the world of illicit drugs, that petitioner knew Saenz was a drug dealer and had traveled with him and that petitioner had lent Saenz his beeper so he could contact him, whereupon Saenz would call petitioner from payphones.

---

[3] As the district court pointed out, the tape was offered into evidence by the prosecution, making it obviously something the prosecution thought was inculpatory, not exculpatory. [JA 437]

Pitcher, supra, 371 F.Supp.2d at 259 (App. 42a). Moreover, the District Court found after the 2255 testimony that the prosecutor offered the tape "because there were a number of demonstrably false statements on it. It also corroborated significant portions of what Mr. Collins [the courier recruited by Pitcher] said about Doug [Pitcher] sitting down with him and Mauricio [the drug dealer]." [JA 436, 437]

Next, the district court found that there was sufficient evidence before the jury to infer that Pitcher knew the scheme involved a controlled substance.

> It almost defies belief that an adult would not realize that, if a drug dealer pays someone $5000.00 plus travel expenses for a trip to South America to smuggle back a chemical substance, he would not realize that it was at least highly likely that the substance was an illegal drug. This alone, together with the inevitable conscious avoidance instruction, was a sufficient basis to submit the case to the jury and secure a conviction.

Pitcher, supra, 8 F.Supp. 2d at 260 (App. 46a).

None of the evidence forming the basis of the district court's decision was available on the direct appeal. Hence the remand request made by appellate counsel following the then-existing, pre-*Massaro* procedure set forth in *Billy-Eko, supra*.

The Government's Appeal of the District Court 2255 Opinion

After the 2255 petition was granted by the District Court, and Pitcher was set free, the government appealed and on March 11, 2009, the Second Circuit reversed the district court, not by disagreeing with its findings of ineffective counsel, but rather because it held Pitcher's 2255 claim to have been precluded by his earlier ineffective-counsel argument made in his 2001 direct appeal, even though there was no record on that appeal on which to judge the issues involved and direct appeal counsel had asked for remand, under the *Billy-Eko* procedure then in effect.

REASONS FOR GRANTING THE WRIT

The Decision Below Conflicts with *Massaro*

In *Massaro, supra*, 538 U.S. 500, this Court made clear its preference that ineffective counsel claims be brought through a §2255 motion rather than on direct appeal. In doing so it rejected the use of the loose approach that had previously been in effect whereby counsel on the direct appeal had to raise incompletely developed ineffective counsel claims or risk losing them. Had *Massaro* not already been decide by the time Picher made his 2255 claim, the facts of this case would have compelled the same result. It is plain that the operative facts were not in the record on the direct appeal, appellate counsel knew it, both she and the government noted the

remand possibility, but the Second Circuit ignored it in 2001 when deciding the direct appeal, and then later, in 2009, treated the claim as fully resolved by the 2001 appeal when deciding to reverse the District Court which had in fact held the required hearing which had not been held in 2001.

The need for a collateral fact finding goes back further than *Massaro*. *See*, *Strickland v. Washington*, 466 U.S. 668, 690-91, 104 S.Ct. 2052 (1984):

> In any ineffectiveness case * * * inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions, just as it may be critical to a proper assessment of counsel's other litigation decisions.

This "inquiry into counsel's conversations with the defendant" is precisely what the direct appeal in Pitcher's case could not accomplish since it had no records with those conversations, but what the District Court did accomplish at a full hearing.

The Second Circuit decision in this case tosses a carefully worded, painstakingly written opinion by the district judge deciding this case. In doing so it not only disregards *Massaro*, it sends a terrible message to district judges who would otherwise take the time to hold the hearings like the one held by the District Court in this case, and then to review the facts

revealed at such a hearing in light of the record at the trial over which that very court presided.

Protestations of Innocence Do Not Lower Counsel's Duty to Offer Reasonable, Competent Advice

While the error above is reason enough for this court to consider this case, another reason for granting this writ is the need to clarify the effect that a criminal defendant's protestations of innocence has on trial counsel's duty. The Second Circuit is all over the map on this matter and, in the two opinions decided in this case, it used Pitcher's protestations of innocence to lower the standard of competence in a way at odds with most Circuit law on this subject. On the direct appeal, the Second Circuit panel found:

> Any deficiency in counsel's advice on this subject is properly attributable to Pitcher's own dishonesty in dealing with his lawyer; Pitcher's counsel admitted that, "*Had [he] realized ... the truth of what had actually occurred here before we went to trial*, [he] never would have went to trial."

United States v. Pitcher, *supra*, 7 Fed.Appx. at 120-21. (Emphasis added) (App. 60a). On the appeal of the 2255 decision on which the panel reversed the District Court decision granting the 2255 relief, the panel wrote that it was "wary of endorsing any precedent that could enable a defendant to benefit from lying to defense counsel or that might suggest a

duty on the part of defense counsel to arm-twist a client who maintains his innocence into pleading guilty.' *United States v. Pitcher*, *supra*, 559 F3d at 125 (App. 13a).

Protestations of innocence do not absolve trial counsel from a clear-eyed consideration of the evidence and a resulting competent recommendation as to the likely outcome of the trial. The District Court correctly commented on Pitcher's claim of innocence as follows:

> In the context of this particular inquiry, petitioner's protestations of innocence have minimal relevance. Any experienced defense attorney knows that guilty defendants often insist on their innocence to their counsel. Furthermore, even an innocent defendant is entitled to an assessment that does not mislead him as to the current strength of his case and the threat of conviction.

Pitcher v. United States, 371 F.Supp.2d at 262 (App. 49a-50a). This observation is in line with all the decisions of the Second Circuit; *United States v. Gordon,* 156 F.3d 376, 380-81 (2d Cir. 1998); *Boria v. Keene*, 99 F.3d 492 (2d Cir. 1996); *see also*, *Toro v. Fairman*, 940 F2d 1065, 1068 (7th Cir. 1991).

As was noted in *Boria v. Keane*, *supra*, 99 F.3d 492, where a sentence after conviction was vacated in favor of time served because the lawyer

had failed to properly advise defendant in relation to a plea offer made before trial:

> . . . he [trial counsel] was certain that the petitioner would never admit his guilt or accept a plea. He said he had been confirmed in this certainty by the petitioner's repeated assertion that accepting a plea would embarrass him in front of his children. . . . He would be very upset about a plea. He was embarrassed in front of his children.

Boria, supra, 99 F.3d at 496. The *Boria* court, recognizing the frequency with which criminal defendants start out denying guilt even to their trial lawyers, fully repudiated the concept that even repeated protestations of innocence (amounting to cries of "never") somehow end the duty to properly inform a client: "Greenwald [trial counsel] admitted that he had been aware that his client - like any other person - was capable of changing his mind." *Id.* at 496. *Boria* then issued its mandate "effective assistance of counsel includes counsel's *informed opinion* as to what pleas should be entered." *Id.*

The advice to Pitcher by trial counsel was not so informed. After all, one other cooperator was sentenced to four days, and the other, the major player in this heroin venture, was sentenced to slightly more than one year. Pitcher received ten years after his counsel urged him to go to trial on counsel's highly-erroneous assessment of the evidence.

Boria is by no means alone on its side of the divide in the Second Circuit. *See, Cullen v. United States,* 194 F.3d 401, 404-07 (2d Cir.1999):

> Protestations of innocence throughout trial are properly a factor in the trial court's analysis, however they do not, by themselves, justify summary denial of relief without an evidentiary hearing.

Yet in Pitcher's case, the same Second Circuit denied just that hearing by refusing to grant it in the original appeal and then ignoring its findings in the later appeal after the 2255 hearing was held and findings made. What the District Court found was that Pitcher was completely misinformed by a mistakenly "highly optimistic" counsel, who had abjectly misread the evidence in a way that "almost defied credibility," (App. 36a) and thus told Pitcher he would be acquitted. It was counsel's substandard assessment of the evidence that damned his performance, not any failure to "coerce" (App. 14a) Pitcher. Far from attempting to coerce Pitcher, trial counsel said he would win at trial, cheered on his decision to go to trial, which led to disaster easily averted.

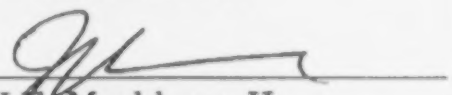
This court would do well to consider and rule upon the proper effect on the right to informed counsel of the all too common occurrence where defendants tell their lawyers they are innocent. Some Second Circuit cases hold that it does not lower the bar, while the Second Circuit in this case was made

"wary" by this common occurrence and its effect on the standard of care to be exercised by trial counsel.

CONCLUSION

This Petition should be granted.

Respectfully submitted
MARKHAM & READ

By: 

John J.E. Markham, II
One Commercial Wharf West
Boston, MA 02110
Tel: (617) 523-6329
Fax: (617) 742-8604
Attorney for Petitioner
Douglas Pitcher

APPENDIX TABLE OF CONTENTS

APPENDIX A

Order for the United States Court of Appeals for the Second Circuit, Dated August 19, 2009.....1a

APPENDIX B

Judgment of the United States Court of Appeals for the Second Circuit, Dated March 11, 2009.....3a

APPENDIX C

Memorandum and Order of the United States District Court for the Eastern District of New York, Dated May 31, 2005 .....15a

APPENDIX D

Judgment of the United States Court of Appeals for the Second Circuit, Dated April 10, 2001.....59a

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

As a stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 19th day of August, two thousand and nine,

---

United States of America

Respondent-Appellant,

v.

Douglas Pitcher,

Respondent, Appellee.

ORDER
Docket No. 05-3182-pr

Petitioner-Appellee Douglas Pitcher having filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the court having considered the request for panel rehearing, and the

active members of the Court having considered the request for rehearing *en banc*,

IT IS HEARBY ORDERED that the petition is denied.

For the Court:

Catherine O'Hagan Wolfe, Clerk

By: Frank Perez, Deputy Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

August Term, 2008

Argued: October 24, 2008 Decided: March 11, 2009
Docket No. 05-3182-cr

United States of America,
Respondent-Appellant

v.

Douglas Pitcher,
Petitioner-Appellee.

BEFORE: WESLEY, HALL, *Circuit Judges* and OBERDORFER, *District Judge**

Appeal from grant of Petitioner's 28 U.S.C. §2255 motion to vacate sentence entered in the United States District Court for the Eastern District of New York (Trager, J.). Following a jury trial, Petitioner was convicted of heroin trafficking related offenses. The district court vacated Petitioner's sentence, finding that trial counsel was ineffective for providing Petitioner an unreasonably optimistic

---

* The Honorable Louis F. Oberdorfer, United States District Judge for the District of Columbia, sitting by designation.

assessment of his chances of acquittal following trial. The district court's holding is contrary to our previous ruling on direct appeal that any error in counsel's advice to his client resulted from Petitioner's own dishonesty in dealing with his attorney rather than from ineffective assistance. We reverse the judgment of the district court and remand for further proceedings consistent with this opinion.

FOR RESPONDENT-APPELLANT:
Jo Ann M. Navickas, (David C. James, *on the brief*), Assistant United States Attorneys, *for* Brenton J. Campbell, United States Attorney for the Eastern District of New York, New York, NY.

FOR DEFENDANT-APPELLEE:
John J.E. Markham, II, Boston, MA.

PER CURIAM

The government appeals the order of the United States District Court for the Eastern District of New York (Trager, *J.*) granting Petitioner Douglas Pitcher's motion to vacate his sentence, pursuant to 28 U.S.C. § 2255, due to defense counsel's ineffective assistance. Pitcher v. United States, 371 F.Supp.2d 246, 258 (E.D.N.Y.2005). On direct appeal, Pitcher raised, *inter*

alia, an ineffective assistance of counsel claim. We rejected this claim and affirmed his conviction. United States v. Pitcher, 7 Fed.Appx. 119, 2001 WL 356941 (2d Cir.2001). We hold that the district court's finding in response to Petitioner's 28 U.S.C. § 2255 petition-that trial counsel provided ineffective assistance by giving Pitcher an unreasonably optimistic assessment of Pitcher's prospects at trial-is contrary to this Court's prior ruling on direct appeal. Accordingly, we reverse.

BACKGROUND

In May 1998, Petitioner-appellee Douglas Pitcher was indicted for conspiracy to import heroin (21 U.S.C. § 963), conspiracy to possess heroin with intent to distribute (21 U.S.C. § 846), and importing heroin (21 U.S.C. § 952). Pitcher, who was not a newcomer to the criminal justice system, was represented by John Jacobs. Pitcher maintained his innocence and refused any government cooperation agreement that required him to plead guilty.[FN1] Following a jury trial in the Eastern District of New York, Pitcher was convicted in October 1998, of all three counts charged in the indictment.

> FN1. According to defense counsel's recollection of events, Pitcher "was not interested in cooperation and was adamant about his innocence. He steadfastly maintained that he did not commit the crimes for which he was indicted and absolutely refused to plead guilty."

After Pitcher's conviction, but before sentencing, another coconspirator, Mauricio Saenz, was arrested and began cooperating with the government. Saenz confirmed that Pitcher had been an active and knowing participant in the conspiracy to import heroin into the United States. Saenz's cooperation was relayed to Pitcher, who then met with the government in March 1999, and admitted to his involvement in the conspiracy.

In an April 1999 status conference held prior to sentencing, the district court asked Attorney Jacobs why Pitcher had gone to trial instead of pleading guilty. Jacobs explained that his client had lied to him "about significant things" related to his involvement in the conspiracy. He added, "Had I realized the defendant's-the truth of what had actually occurred here before we went to trial, I never would have went to trial." Pitcher also explained to the court why he had not "take[n] a shot at cooperation [with the government]": "I just didn't think that I was guilty. I thought I had a very good chance at winning, because in my eyes, I didn't see me being guilty." In June 1999 the district court appointed Susan Kellerman to replace Jacobs as Petitioner's attorney. The district court sentenced Pitcher, in March 2000, to 121 months' imprisonment.

On direct appeal, Pitcher admitted his participation in the charged offenses, but he argued that he would have pursued a cooperation agreement with the government but for the ineffectiveness of his

counsel, who convinced him to spurn the government's efforts to sign him up as a cooperator. We rejected this argument in an April 10, 2001, summary order:

> The government "was interested in trying to sign [Pitcher] up as a cooperator from the beginning, and [this] was made clear to the defendant at the moment of his arrest;" but Pitcher proceeded to trial because, in his words, he "didn't think [he] was guilty" and "thought [he] had a good chance of winning." Any deficiency in counsel's advice on this subject is properly attributable to Pitcher's own dishonesty in dealing with his lawyer; Pitcher's counsel admitted that, "Had [he] realized ... the truth of what had actually occurred here before we went to trial, [he] never would have [gone] to trial."

United States v. Pitcher, 7 Fed.Appx. 119, 120-21, 2001 WL 356941 at *1 (2d Cir.2001).

Pitcher then filed his § 2255 petition in the district court, seeking to vacate his sentence on the ground that he would have received a significantly shorter sentence had trial counsel not misinformed him about the benefits of cooperation and the risks he faced by proceeding to trial. The district court held an evidentiary hearing in July 2004. At the hearing Jacobs testified he explored with Pitcher the possibility of cooperation but Pitcher had vigorously asserted his innocence.

In June 2005, the district court granted Pitcher's

motion, vacated his 121-month sentence, and resentenced him to time served. Pitcher v. United States, 371 F.Supp.2d 246, 265 (E.D.N.Y.2005). The district court found that Jacobs had provided Pitcher an overly optimistic assessment of his trial prospects. Id. at 262 ("[T]here appears to be no reasonable basis upon which a competent defense attorney would have reached the conclusion that petitioner had a 'winnable' case."). As a result, the district court concluded that Jacobs's performance had been constitutionally deficient and that this had prejudiced Pitcher's defense. Id. at 262-63.

The district court acknowledged that Pitcher lied to Jacobs about his involvement in the charged offenses, but the court found that this did not absolve Jacobs of his responsibility to persuade Pitcher to accept the government's offer:

> Although [Pitcher] did lie to his attorney, there is no basis for assuming he would have stuck to this story if Jacobs had provided reasonable advice concerning the serious danger of conviction and the comparative advantages of cooperation. Jacobs, by unreasonably telling [Pitcher] that his story was a good one, ... and that the government's case was weak, gave [Pitcher] precious little incentive to say anything else. Id. at 263.

The district court held that Pitcher's ineffective assistance claim in his petition was not procedurally barred by this Court's summary order dispatching

Pitcher's direct appeal because the specific ineffective assistance claim made in the petition was "analytically distinct" from the claim brought on direct appeal. Id. at 264.

The United States appeals.

DISCUSSION

We review a district court's findings of fact for clear error, and its grant of a § 2255 petition de novo. Rega v. United States, 263 F.3d 18, 21 (2d Cir.2001). A federal court may not vacate a sentence of a prisoner in federal custody unless it "was imposed in violation of the Constitution or laws of the United States, or ... the court was without jurisdiction to impose such sentence, or ... the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack." 28 U.S.C. § 2255(a). The Sixth Amendment right to effective counsel attaches at all "critical stage[s]" of the case following the "formal initiation of adversary judicial proceedings." Moran v. Burbine, 475 U.S. 412, 429, 432, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986). "It is well settled that a defendant's Sixth Amendment right to counsel extends to plea negotiations." Davis v. Greiner, 428 F.3d 81, 87 (2d Cir.2005). To prevail on a claim of ineffective assistance of counsel, a petitioner must demonstrate that: (1) counsel's representation fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different.

See Strickland v. Washington, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). "The reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error." Kimmelman v. Morrison, 477 U.S. 365, 381,106 S.Ct. 2574, 91 L.Ed.2d 305 (1986).

On appeal, the government argues that Petitioner's claim of ineffective assistance of counsel is barred by our previous finding on direct appeal that trial counsel was not ineffective. We agree. "It is well established that a § 2255 petition cannot be used to 'relitigate questions which were raised and considered on direct appeal.' " United States v. Sanin, 252 F.3d 79, 83 (2d Cir.2001) (quoting Cabrera v. United States, 972 F.2d 23, 25 (2d Cir.1992)); see also Douglas v. United States, 13 F.3d 43, 46 (2d Cir.1993) ("[A]ny claim raised by [petitioner] ... that was also raised ... on direct appeal of his conviction is precluded from consideration by this Court."). A claim is not barred from being brought in a § 2255 motion where it rests upon a different legal "ground" for relief than the one previously raised. See Williams v. United States, 731 F.2d 138, 141-42 (2d Cir.1984).

The Supreme Court has explained the meaning of "ground":

> [W]e mean simply a sufficient legal basis for granting the relief sought by the applicant. For example, the contention that an involuntary confession was admitted in evidence against him is a distinct ground

> for federal collateral relief. But a claim of involuntary confession predicated on alleged psychological coercion does not raise a different "ground" than does one predicated on alleged physical coercion. In other words, identical grounds may often be proved by different factual allegations. So also, identical grounds may often be supported by different legal arguments, or be couched in different language, or vary in immaterial respects. Should doubts arise in particular cases as to whether two grounds are different or the same, they should be resolved in favor of the applicant.

Sanders v. United States, 373 U.S. 1, 16, 83 S.Ct. 1068, 10 L.Ed.2d 148 (1963) (internal citations omitted). The district court concluded that Pitcher's habeas claim rested on a separate legal ground, one that is "analytically distinct," from his ineffective assistance claim brought on direct appeal. Pitcher, 371 F.Supp.2d at 264. This determination was in error. In his § 2255 petition, Pitcher "may not now contend that counsel was deficient ... because that ground was substantially argued to, and rejected by, this court on [Petitioner's] direct appeal." Riascos-Prado v. United States, 66 F.3d 30, 34 (2d Cir.1995). The ineffective assistance claim made in the § 2255 petition, premised on Jacobs having provided Pitcher an overly optimistic assessment of his chances at trial (thus, encouraging him to reject the government's attempts to sign him up as a cooperator) is simply the inverse of the argument Pitcher made on direct appeal-that Attorney Jacobs was ineffective for discouraging his client from

cooperating with the government. Both of these arguments are premised on the same facts and rest on the same legal ground. At the very least, the argument made in Pitcher's § 2255 petition is precluded because it is "simply a slightly altered rearticulation of a claim that was rejected on his direct appeal." Riascos-Prado, 66 F.3d at 34.

In reaching its decision that Petitioner's claim rests upon a legal ground different from the one brought on direct appeal, the district court found that Pitcher's § 2255 claim: "could not have been raised without an opportunity to gather evidence regarding the bases of Jacobs' assessment [of Pitcher's prospects of winning at trial], which could only take place, and did only take place, in conjunction with the instant *habeas* petition." Pitcher, 371 F.Supp.2d at 264. We disagree. On direct appeal we dispatched Petitioner's first claim of ineffective assistance because the facts then available made resolution of his claim clear beyond any doubt. See United States v. Khedr, 343 F.3d 96, 99-100 (2d Cir.2003) (noting that although "we have a baseline aversion to resolving ineffectiveness claims on direct review," we will resolve such claims brought for the first time on direct appeal when "their resolution is beyond any doubt" or when doing so "would be in the interest of justice." (internal quotations omitted)). The same logic applies here. No further fact-finding was necessary given that Jacobs explained to the court in an April 14, 1999 status conference held prior to sentencing that Pitcher, who had only recently admitted his involvement in the

conspiracy, had lied to him "about significant things" related to his involvement in the conspiracy and "[h]ad I realized the defendant's-the truth of what had actually occurred here before we went to trial, I never would have went [sic] to trial." At the same status conference, Petitioner admitted to the court that he thought he had "a very good chance at winning" because he "didn't think [he] was guilty."

These facts make clear that Jacobs would not have given Pitcher such a "positive prognosis about his chances of winning at trial," Pitcher, 371 F.Supp.2d at 257, had Pitcher not lied to him about his involvement in the charged offenses. Our holding on direct appeal-that "[a]ny deficiency in counsel's advice on this subject is properly attributable to Pitcher's own dishonesty in dealing with his lawyer"-applies equally to the reiterated ineffective assistance claim made here. Pitcher, 7 Fed.Appx. at 120-21. Because this ground was already litigated and resolved on direct appeal, it cannot be relitigated as part of Pitcher's § 2255 petition. See Sanin, 252 F.3d at 83.

Although we reverse on the grounds stated, we add that we are wary of endorsing any precedent that could enable a defendant to benefit from lying to his defense counsel or that might suggest a duty on the part of defense counsel to arm-twist a client who maintains his innocence into pleading guilty. See Purdy v. United States, 208 F.3d 41, 45 (2d Cir.2000) ("[T]he ultimate decision whether to plead guilty must be made by the defendant. And a lawyer must take

care not to coerce a client into either accepting or rejecting a plea offer.").

CONCLUSION

For the reasons stated herein, the judgment of the district court is reversed, and the case is remanded for further proceedings consistent with this opinion.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

DOUGLAS PITCHER,	:	
Petitioner,	:	
- against -	:	
	:	Civil Action No.
UNITED STATES OF AMERICA	:	03-CV-3174
	:	
	:	Related Criminal
Respondent.	:	Case 98-CR-0543

MEMORANDUM AND ORDER

TRAGER, J.

Douglas Pitcher petitions this court, pursuant to 28 U.S.C. § 2255, to vacate a 121-month sentence and substitute a sentence of time served, on the ground that he would have received a significantly shorter sentence had he not been seriously misinformed by his defense counsel about the benefits of cooperation and the risks of trial. Although the former claim is rejected, the latter claim has merit, and, accordingly, the petition is granted.

Background

(1)

In late 1997 petitioner, then 23 years old, was dealing in marijuana while residing in New Jersey. Mauricio Saenz, 38 years old, was his supplier. At some point Saenz asked petitioner to act as drug courier for a trip to South America. Petitioner declined, in part because, having a prior conviction for possession of Ecstasy, he did not want to risk another drug-related conviction. He was, however, willing to help Saenz recruit another courier.

Brian Collins, 24 years old, had purchased marijuana from petitioner on a regular basis for the past year. In early November, 1997, petitioner proposed to Collins that he make a trip to South America, on behalf of "Mauricio" and in exchange for $5,000, ostensibly in order to smuggle into the United States a chemical ingredient of the drug Ecstasy. After Collins expressed an interest, petitioner arranged a meeting at petitioner's home attended by petitioner, Collins and "Mauricio." When they met, Mauricio told Collins that the previous courier, a woman, had backed out. He assured Collins that the chemical was one that dogs could not detect. Gov't Ex. 25 at 18; Trial Tr. at 322.

On December 2, Mauricio picked up Collins at his home and drove him to a passport agency in Philadelphia to obtain a passport. At about this time,

Mauricio gave Collins a few hundred dollars for expenses and a round-trip airline ticket in Collins' name. Mauricio told Collins that Mauricio's brother ("David") would meet Collins at the airport upon his arrival in Ecuador. Collins departed from John F. Kennedy International Airport on the morning of December 3, 1997. Upon arrival in Ecuador, David met him at the airport, and for the next four nights Collins stayed in a room at a seaside hotel. On the morning of Collins' flight home, David packed in Collins' luggage a number of items which Collins understood would contain the illicit substance. On December 7, 1997, upon his return from Ecuador, Collins was stopped at John F. Kennedy International Airport. More than a kilogram of heroin was found in his luggage, sewn into the lining of various articles of clothing.

Collins was arrested and immediately agreed to cooperate with law enforcement officials. He was interviewed that day by Customs Agent Diana Tsang, and he initially told her that a man named "Dave" had recruited him for the trip on behalf of "Mauricio." [FN1] However, on January 8, in a proffer session attended by Agent Tsang, Assistant United States Attorney Dwight Holton ("AUSA Holton") and Collins' attorney, Collins revealed that the "Dave" who had recruited him was actually petitioner. Collins said that petitioner had approached him regarding making a trip to South America and had discussed compensation, that his initial meeting with Mauricio had taken place at petitioner's residence with

petitioner present and that Mauricio had used petitioner's car to drive him to get his passport on December 2. Collins also discussed conversations he had had with petitioner following his arrest, during which petitioner mentioned a woman, connected with Mauricio, who had been arrested in Texas. These statements were noted in reports by Agent Tsang. However, it was not until much later, in two debriefings conducted about a month before petitioner's trial, that Collins mentioned other aspects of petitioner's involvement.[FN2]

> FN1. Petitioner never used "Dave" as an alias. Collins testified at trial that he had made up this name, in order to "hold back information" about petitioner. Trial Tr. at 144-49.

> FN2. According to Agent Tsang, these included allegations that petitioner took Collins to get his passport photos, that petitioner had maintained phone contact regarding arrangements for the trip and that petitioner had driven Collins to the airport on the day of his departure for Ecuador. However, only the statement regarding the passport photos was mentioned in Agent Tsang's report of these sessions.

As part of his cooperation, on March 12, 1998, Collins made a monitored and tape-recorded phone call to petitioner. The tape seemed to confirm aspects of Collins' story and, in particular, contained an

acknowledgment by petitioner that he had introduced Collins to Mauricio, and that he knew a "girlfriend" who had previously gone on a similar trip for Mauricio.[FN3]

> FN3. The tape's contents will be described in greater detail in the summary of petitioner's trial below.

On May 5, 1998, Collins pled guilty to the importation of heroin (21 U.S.C. § 952) under a cooperation agreement.

(2)

On April 22, 1998, customs agents, including Agent Diana Tsang, arrested petitioner at his home. Petitioner told the agents that he was aware that this was about Mauricio and about Collins' trip, and that he was willing to cooperate, but said he wanted first to speak to an attorney. It is undisputed that agents made it clear to petitioner that they were interested in his cooperation. See Tr. of 4/14/99 Status Conf. at 9; see also Trial Tr. at 227, 238. He had in fact been arrested for that purpose. Hr'g Tr. at 102.

Petitioner did not contact his family because he did not want them to know that he had been arrested for another drug-related charge. Instead, he requested that an attorney be appointed because he could not afford one. Petitioner first met his court-appointed attorney, John Jacobs, at his arraignment. At the

arraignment, AUSA Holton informed Jacobs that the government was interested in petitioner's cooperation, and Jacobs relayed this to petitioner. Petitioner told Jacobs that he was innocent of the charges. However, Jacob's efforts, at that stage, were focused on obtaining petitioner's release on bail, and discussions about cooperation were not extensive.

Over the ensuing months, there were discussions between Holton and Jacobs regarding cooperation. Additionally, Agent Tsang contacted petitioner and made appointments with him to meet with her. Petitioner canceled two or three such sessions. At some point thereafter, in April, 1998, petitioner contacted Holton to ask him for Tsang's phone number. Holton told petitioner that it was not appropriate for them to speak and that petitioner should contact his own attorney. When petitioner later contacted Jacobs, Jacobs was upset to learn that there had been interaction between Tsang and petitioner, and on May 2, 1998 took steps to inform both Tsang and Holton that all future contact should be through Jacobs. Hr'g Tr. at 62.

At some point in May, 1998, petitioner met with Jacobs for the first time since his arraignment, and they met again on several other occasions prior to trial. Jacobs provided petitioner with copies of all material received from the prosecutor pursuant to 18 U.S.C. § 3500, including Tsang's reports of Collins' statements. Jacobs had received a copy of the March 12 tape, and Jacobs and petitioner reviewed its

contents together. Petitioner told Jacobs he was innocent and told him a story consistent with the one he later told at trial.

On May 21, 1998, petitioner was indicted for conspiring to import heroin (21 U.S.C. §§ 963, 952), conspiring to possess heroin with intent to distribute (21 U.S.C. §§ 846, 841) and importing heroin (21 U.S.C. § 952). Jacobs continued to discuss the possibility of cooperation with AUSA Holton, but shortly before trial, Jacobs informed Holton that he had become convinced of petitioner's innocence, and that, in light of the government's position that petitioner must admit his guilt, cooperation would therefore be impossible.

(3)

Ultimately, in October 1998, petitioner's case proceeded to trial. Collins was a key witness for the government. Collins testified that he had known petitioner since late 1996 and had regularly bought marijuana from him. In early November 1997, while Collins was visiting petitioner for a purchase, he asked Collins if he was interested in making $5,000 by making a trip to South America. Petitioner told Collins that the purpose of the trip was to smuggle into the United States a chemical ingredient to be used in making Ecstasy. Petitioner assured Collins that the trip would be safe and basically like a vacation, but that petitioner himself never made the trip because he feared his strong muscular build

would lead to suspicion that he was importing steroids. He also told Collins that he knew a girl who had made a similar trip.

Collins testified that some days later, he told petitioner he was interested in this proposal, whereupon petitioner set up a meeting at his house with "Mauricio" sometime before Thanksgiving. Mauricio's girlfriend (not named) and petitioner's girlfriend Maureen Killemet were also present, but took no part in the discussion. Mauricio had plane tickets with him, but they were in a woman's name. Collins was told that this woman kept postponing the trip, and that the tickets would have to be transferred to Collins' name. He remembered an argument that took place at this meeting between petitioner and Mauricio, but did not recall what it was about.

Thereafter, petitioner continued to act as middleman for Mauricio and phoned Collins numerous times to arrange various details of the trip. In particular, petitioner told Collins that he would need to travel to Philadelphia to obtain a passport for the trip. On December 1, 1997, petitioner, accompanied by Killemet, drove Collins to get passport photos at a local studio, paid for the photos and told Collins that Mauricio would reimburse him. The next day, December 2, Mauricio and Mauricio's girlfriend, in petitioner's car, picked up Collins and drove him to Philadelphia to get a passport. On the morning of December 3, 1997, petitioner, again accompanied by Killemet, picked up Collins and drove

him to John F. Kennedy International Airport.

Collins also testified that, during his trip to Ecuador, he called petitioner several times at petitioner's home in New Jersey to complain about the trip. Collins also testified regarding his arrest, his decision to cooperate and his recorded phone call to petitioner on March 12, 1998.

The tape-recorded phone call ("the tape") was admitted in evidence. On the tape Collins explained to petitioner his plight and his need to find Mauricio in order to avoid jail time. He asked petitioner for information leading to Mauricio. Petitioner expressed a willingness to help. However, throughout the tape, petitioner was guarded and hesitant. At one point he expressed certainty that Collins' phone line was tapped. Gov't Ex. 25 at 19.

Nonetheless, petitioner made several significant admissions on the tape, which lasted about forty-five minutes. In particular, petitioner acknowledged that it was he who had first introduced Collins to Mauricio. Id. at 11, 35. When Collins asked petitioner if he was supposed to receive anything from Mauricio in return for this introduction, petitioner denied it. Id. at 66. At another point, petitioner mentioned a "brawl" he had with Mauricio while Collins was present, because Mauricio was asking petitioner to do various favors and petitioner did not want to get involved. Id. at 17, 35.

On the tape, petitioner correctly told Collins that Mauricio's last name was "Saenz" and said that he operated in Linden, New Jersey. Id. at 3, 6, 12. Petitioner said he had known Mauricio for less than a year, and had met him through a man named Tony. Id. at 8. Petitioner had been in Florida with Mauricio and knew that Mauricio's girlfriend had friends in Fort Lauderdale. Id. at 5, 9. Petitioner mentioned that he had allowed Mauricio to use petitioner's own beeper. Id. at 4.

Collins asked petitioner about a "girl" petitioner knew who had been in trouble. At first, petitioner seemed to deny that this girl was connected to Mauricio. Id. at 6-7. However, later in the tape, petitioner identified her as his girlfriend, Brandy, and admitted she had once made a similar trip for Mauricio. Id. at 15. Petitioner insisted that Brandy knew nothing about Mauricio except his first name and would never admit making the trip in any event. Id. at 16. He said Brandy had got in big trouble in Texas for "driving pot," but this was "on her own." Id. at 6-7, 16.

Petitioner made many other comments suggesting awareness that Mauricio was a drug dealer.[FN4] Regarding Mauricio, he remarked: "If you're that old, and you're ... still doing that, you really got problems.... It's not like ... us ... you go through a phase ... at some time you realize it's just not right.... He's ... 38 years old and he's still doing this...." Id. at 10. He said that when Mauricio called

him, it would always be from payphones. Id. at 11. He reminded Collins that, during the "brawl," Mauricio had said "I've been doing this for all my life." Id. at 17. After discussing Mauricio and his brother, petitioner remarked: "These guys ... just have connections because they're Columbian.... [O]ver there everything's ... dirt cheap." Id. at 20.

> FN4. Of course, prior to the taped conversation, Collins had already told petitioner that he had been caught with heroin.

At one point, petitioner reminded Collins that, because of what happened with someone named Jay,[FN5] Collins would not have gone if he had known "what it was." Id. at 28. Collins agreed, saying that he knew people who had gotten "all fucked up" and he would not want to support that habit for anybody. Id. at 28. Later in the conversation, Collins tried to return the complement: "Especially that shit too. It's not like ... you would definitely ain't involved in none of that." Petitioner's response was noncommittal: "Yeah. I don't know. But. Well...." Id. at 36.

> FN5. Collins clarified at trial that "Jay" was a friend of his who had become addicted to heroin.

They discussed Ecstasy at various points. Collins said his lawyer had told him that when they make Ecstasy, they put heroin in it. Petitioner corrected him: "That's only in some cases." Id. at 29.

Collins asked petitioner if Mauricio actually ever made Ecstasy. Petitioner was unsure, but said Mauricio had spoken about getting one ingredient from Quito and another from Spain. "I don't think you need that much ... stuff to ... make a pill.... [T]hat sounds a little farfetched," petitioner added. Id. at 29.

The government also presented phone records that showed 19 phone calls between petitioner and Collins in the 26 days preceding the trip, and calls at the time of the trip. Other government witnesses included a drug expert, a chemist and a travel agent. The chemist's testimony included a discussion of the street value of Ecstasy, which he placed at about $20 a pill. He also testified regarding various chemical ingredients used to make Ecstasy, all of which come in liquid form. The travel agent confirmed that an airline ticket in a woman's name had been exchanged for the ticket issued in the name of Brian Collins.

(4)

Petitioner testified on his own behalf. He conceded that he had introduced Collins to Mauricio while both were present at his own house. However, he denied that he had done this so that Collins would make an importation trip for Mauricio. In fact, he had tried to talk Collins out of taking the trip, which led to an argument between himself and Mauricio. He also tried to dissuade Collins during the phone conversations in the weeks that followed. He did not

know that Collins would be importing drugs, but rather believed what he had heard Mauricio tell Collins-that the substance would be a chemical ingredient for the manufacture of Ecstasy. Petitioner denied driving Collins for his passport photo or to the airport. He admitted having previously been arrested at a nightclub with 117 pills of Ecstasy in his possession, but claimed these pills, which had cost him $15 each, were only for himself and his friends. He admitted to dealing in marijuana.

(5)

During summations, the government argued that petitioner's story was not credible. In particular, the government argued that Mauricio would not have sent Collins, who was a total stranger to Mauricio, on a drug trip, unless someone Mauricio trusted had vouched for Collins. That someone could only have been petitioner, who admitted introducing Mauricio to Collins at his house. Jacobs, in turn, argued on behalf of petitioner that the tape established petitioner's innocence. Collins, he claimed, was just not credible, and had belatedly invented testimony against petitioner because Mauricio was still at large and Collins needed someone to give the government. Jacobs focused on the timing of certain aspects of Collins' story, such as his belated revelations about petitioner driving him for passport photos and to the airport.

For the two conspiracy counts, the jury was

instructed as to Count One that they must find that the objective was to "knowingly and intentionally import heroin or any other controlled substance," and as to Count Two that the objective was to "knowingly and intentionally possess with intent to distribute heroin or any other controlled substance." The jury was further instructed that the chemical used to make Ecstasy was not a controlled substance. On October 16, 1998 the jury, after deliberating for three hours, convicted Petitioner of conspiring to import heroin (21 U.S.C. §§ 963, 952), conspiring to possess heroin with intent to distribute (21 U.S.C. §§ 846, 841) and importing heroin (21 U.S.C. § 952).

(6)

Shortly after trial, but before sentencing, Jacobs arranged a meeting with the government. Jacobs argued that petitioner was wrongly convicted; that since petitioner did not know the scheme involved the importation of a narcotic drug, he was guilty, at best, of scheming to import a chemical substance without a permit. The government rejected these arguments.

After the above meeting, in December of 1998, Mauricio Saenz was arrested. Saenz admitted his role in the operation and agreed to cooperate with authorities. Saenz told authorities that he had asked petitioner to help him recruit a new courier after a scheduled courier had backed out, that petitioner had known the purpose of the trip was to import a narcotic

drug, and that Saenz and petitioner both lied to Collins about the substance being an ingredient for Ecstasy. The government relayed this information to Jacobs as a courtesy. Jacobs then confronted petitioner, and petitioner admitted that he had lied about his role in the conspiracy.

Jacobs then asked the government to permit petitioner to cooperate. The government was skeptical, but agreed to a proffer session, which was held on March 3, 1999. Petitioner admitted he had known the scheme was to import a controlled substance, that he had taken Collins for his passport photo and to the airport, and that he had loaned Saenz his car for the purpose of driving Collins for his passport.

On April 14, 1999, a post-conviction status conference was held before this court. AUSA Holton indicated that petitioner had been directly offered cooperation immediately following his arrest and had apparently considered cooperation over the following months. Tr. of 4/14/99 Status Conf. at 9. When this court asked petitioner why he had declined to cooperate, petitioner explained that he was scared, thought his role was minor, did not see himself as guilty, and thought he had a very good chance of winning at trial. His understanding was that if he cooperated, he would get ten years, and at the time, he had not heard of the possibility of a § 5K1 letter. He had not understood everything Jacobs told him about the benefits of cooperation, and Jacobs told him he had a "good shot" at trial. Id. at 15-16.

Jacobs confirmed that the government had been eager for petitioner's cooperation, and said that petitioner, in turn, had been eager to testify against Saenz. Id. at 16-17. According to Jacobs, the main factor preventing petitioner from cooperating was his unwillingness to accept, intellectually, that he was guilty. Id. This was critical since the government had made clear that a guilty plea was required for cooperation. Id. at 17. Jacobs also stated that if petitioner had told him the truth, he never would have gone to trial, and that he felt that petitioner had a credible defense based on the comments petitioner made in his tape-recorded conversation with Collins. Id. at 23-24.

Shortly after this conference, petitioner wrote a letter to the prosecutor, Dwight Holden.[FN6] In the letter, petitioner claimed that he had wanted to cooperate with the government, but that his attorney, Jacobs, had advised him to cease all communications with both Holden and the agents, and had told him that he, Jacobs, would handle the discussions from that point on. He wrote:

> FN6. The letter was dated April 26, 1998 and received by the prosecutor's office shortly after May 3, 1999. Presumably, it was actually composed on April 26, 1999.

I was told [FN7] if I would cooperate I would get under the 10 [year] guide line. I was not aware or informed of all the reductions and programs I was

eligible for, nor if I assisted there was a good chance I wouldn't receive any time at all. By the information I was given it seemed going to trial was the only hope. I only wish I knew more about the 5K1 letter at that time. However, it was embedded in my head by my attorney that my case would be dismissed.

> FN7. This was probably meant to read "not told" since that would be consistent with what petitioner told the Court some days before he wrote this letter as well as with the paragraph's overall point.

Petitioner also indicated that he had not adequately understood the law of conspiracy.

On June 11, 1999, this court appointed Susan Kellman to replace Jacobs as petitioner's attorney. Additional status conferences were held on July 14, 1999, and December 10, 1999, with Kellman representing petitioner. There was some discussion at the December 10 conference about whether Jacobs might have been ineffective in advising petitioner. The government argued that Jacobs had urged petitioner to cooperate, and, in any event, had apparently believed his client's innocence, and, after the conviction but before Saenz was apprehended, he "spent a half hour trying to convince [AUSA Holton] that petitioner was, in fact, innocent." Tr. of 12/10/99 Status Conf. at 21.

On March 10, 2000, this court sentenced petitioner, for each of the three counts of conviction, to a concurrent term of 121 months, at the bottom of the applicable guideline range.[FN8]

> FN8. In contrast, Saenz, who immediately cooperated following his arrest, received a sentence of only 13 months.

(7)

Petitioner appealed his conviction to the United States Court of Appeals for the Second Circuit. Petitioner argued, inter alia, that he would have pursued a cooperation agreement but for the ineffectiveness of his counsel before trial, and that counsel should have sought a special verdict as to whether petitioner knew the conspiracy involved a controlled substance. Petitioner argued, in his main brief, that Jacobs was ineffective before trial on the following grounds: petitioner "was not adequately advised as to the elements of the crimes charged and as to his culpability for the crime, nor was he advised as to the significance of a cooperation agreement and its sentencing implications,"see Brief for Defendant-Appellant at 1; petitioner "was never advised by trial counsel before trial of the significance of a 5k1 letter...,"*see id.* at 16; Jacobs "failed to adequately explain to [petitioner] the law of conspiracy,"see id. at 17; Jacobs was "remiss in not getting [petitioner's] family involved until after the trial was over" and "did not properly advise [petitioner] of the elements of the

crimes charged and the irrelevance of whether he had a monetary stake,"see id. The brief also alleged that "it was counsel's decision alone not to allow [petitioner] to cooperate." Id. at 19. Petitioner made no other allegations in support of the claim of pre-trial ineffectiveness.

On April 10, 2001, the Second Circuit affirmed in a summary order petitioner's judgment of conviction. With respect to the claim that counsel had been ineffective during plea bargaining, the court noted that petitioner "proceeded to trial because, in his words, he 'didn't think [he] was guilty' and 'thought [he] had a good chance of winning,' " and, therefore, held that "[a]ny deficiency in counsel's performance on this subject is properly attributable to Pitcher's own dishonesty in dealing with his lawyer; Pitcher's counsel admitted that, [sic] 'Had [he] realized the truth of what had actually occurred here before we went to trial, [he] never would have went to trial.' " United States v. Pitcher, 7 Fed.Appx. 119, 2001 WL 356941 (2d Cir.2001). The Second Circuit also held that the proposed special verdict would have been irrelevant. "The government needed only to prove that: i) the drug imported was heroin and ii) the defendant had the intent to import any controlled substance." Id. at 121, citing United States v. Obi, 947 F.2d 1031, 1032 (2d Cir.1991) and United States v. Collado-Gomez, 834 F.2d 280, 280-81 (2d Cir.1987).[FN9]

FN9. Although the Second Circuit did not say

> so explicitly, its reasoning strongly implies that there is no legal significance under these circumstances (*i.e.*, where the actual substance turns out to be heroin) to the distinction between the two mental states of knowingly conspiring to import a controlled substance, and knowingly conspiring to import a chemical intended for the manufacture of a controlled substance.

(8)

Petitioner's current petition was filed on June 26, 2003. On July 27, 2004, an evidentiary hearing was held before this court concerning petitioner's § 2255 motion. Petitioner testified on his own behalf. Jacobs and Holton testified for the government. Much of the information conveyed during this hearing has been incorporated into the summaries given above. The summary below focuses on that which is in conflict or of particular significance.

Petitioner testified that he cancelled two or three meetings with Agent Tsang because petitioner had no driver's license and because the friend he relied on to drive him was often unavailable. Hr'g Tr. at 11-12. After petitioner spoke to Holton some time in May, and was told such contact was improper, he made no further efforts to schedule such meetings on his own. Id. at 12-14, 16. When he met with Jacobs about two weeks later, Jacobs told him that if he cooperated he would be subject to a mandatory

minimum of ten years, and that if he did not cooperate he would get anything above ten years. Id. at 14. Jacobs told him that the government's case was weak and that they were "bootstrapping their indictment"- that they had indicted him for the wrong offense, and should have charged him with Ecstasy instead of heroin. Id. at 15, 41. Jacobs told him he would be acquitted for this reason, and not because his claimed lack of involvement was otherwise credible. Id. at 40. Jacobs assured him that the tape worked in his favor because it verified that he had been misindicted.[FN10] Id. at 40-41. On the basis of this advice, petitioner decided not to cooperate. Id. at 17.

> FN10. Presumably, this would be because the tape supposedly showed that petitioner thought it was a chemical ingredient for the manufacture of Ecstasy.

Petitioner met with Jacobs three to five times in all, but after his first or second meeting, the two had no more discussions about cooperation. Id. at 27. No more meetings were arranged with the government, and petitioner never again spoke to Tsang. Id. at 16. Jacobs had told him that there was no way to get underneath the mandatory minimum sentence and had never mentioned a § 5K1 letter. Id. at 18-19. Petitioner said Jacobs discussed the possibility of taking the stand at trial, but "we never went over it," and when he did testify, it was a shotgun decision. Id. at 49-50.

Jacobs testified that he has been a criminal attorney since 1970 and has handled thousands of criminal cases as either prosecution or defense. Id. at 55. His memory of the case was unclear, and he could no longer recall which specific substances were at issue. Id. at 56, 59. However, he contradicted petitioner on various points. He had explained the benefits of cooperation, and told him that he would have a chance to "walk," but that he could not guarantee it. Id. at 59. He discussed the § 5K1 letter "numerous times." Id. at 61. The option of pleading guilty without cooperating was also discussed. Jacobs explained to petitioner about the mandatory minimum and that he was not eligible for the "safety valve" because of his prior conviction. Id. at 60. He and petitioner had at least three or four conversations about taking the stand, and Jacobs prepared petitioner by going over direct and cross. Id. at 63. He denied that he had ever advised petitioner not to cooperate. Id. at 79.

Jacobs' testimony, however, confirmed petitioner's claims that Jacobs had been highly optimistic to petitioner regarding petitioner's chances at trial. Jacobs testified he had thought petitioner was not guilty "if that was his story." Id. at 58-59. He tested petitioner's story with the evidence from the case and with Collins' version of events, and concluded that petitioner's story was consistent. Id. at 63, 68. He believed the jury would acquit petitioner, and that the tape supported his statements. Id. at 63. He felt, "absolutely," that the government's case

was thin. Id. Jacobs placed special emphasis on the tape transcript as supporting this assessment. "If I remember correctly, the transcript was about as strong a piece of evidence as I've seen in the years in the drug cases. I thought he would be acquitted on that and so did Mr. Pitcher." Id. at 72.

Discussion

In order to prevail on a claim of ineffective assistance of counsel, petitioner must establish two things. First, Jacobs' performance was constitutionally deficient. Second, the deficient performance prejudiced his defense. See Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The right to effective counsel arises under the Sixth Amendment and attaches at all critical stages of the proceeding after the initiation of formal charges. Moran v. Burbine, 475 U.S. 412, 431, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986). This has been held to include plea negotiations. See Cullen v. United States, 194 F.3d 401, 404 (2d Cir.1999); Boria v. Keane, 99 F.3d 492, 496-97 (2d Cir.1996).

Petitioner's claim of ineffectiveness can be divided into three elements. First, petitioner has claimed that Jacobs was ineffective because he incorrectly told him that if he cooperated, the minimum sentence he could receive would be ten years. Second, he claims that Jacobs advised him not to cooperate. Third, he has claimed that Jacobs gave him an unreasonably positive prognosis about his

chances of winning at trial-that he assured him the case was "winnable."

(1)

If petitioner's first claim were credited, there would be little question that Jacob's representation would be constitutionally deficient, resulting in petitioner being seriously misinformed about facts critical to his decision to reject a plea agreement with cooperation. See United States v. Gordon, 156 F.3d 376 (2d Cir.1998) (counsel ineffective where client rejected a plea offer with an exposure of 7 years after being misinformed that convictions would expose him to 10 years, but instead received 22 years). However, self-serving post-conviction claims regarding counsel's advice, without some further evidence, are generally insufficient to establish ineffectiveness. See Johnson v. Duckworth, 793 F.2d 898, 902 n. 3 (7th Cir.1986). Since petitioner has already perjured himself before this court in the hope of avoiding conviction, there are particularly strong grounds for giving little weight to allegations that cannot be otherwise confirmed.

With the above in mind, one cannot credit petitioner's claim that Jacobs told him that even with a cooperation agreement he would still receive a minimum of ten years. Jacobs denied that he told petitioner anything of the sort. Moreover, it appears unlikely that a defense attorney with Jacobs' experience would have been so entirely unaware of the potential benefits of cooperation agreements,[FN11] or

would have any motive to mislead his client in such a manner. Moreover, when questioned by this court at the August 14 status conference, petitioner appeared less than certain about what precisely Jacobs told him. See Tr. of Status Conf. 4/14/99 at 12-14. A more plausible possibility might be that petitioner misunderstood statements by Jacobs that were meant to apply to a guilty plea without cooperation. Such confusion might be more likely if Jacobs failed, under the circumstances, to place appropriate emphasis on the benefits of cooperation as contrasted with the dangers of trial. However, to the extent that any weight can be given to this possibility, it is best considered in the context of petitioner's remaining allegations.

> FN11. Jacobs, in fact, demonstrated such knowledge at trial when he cross-examined Collins on the benefits he expected to receive as a result of his cooperation agreement. Trial Tr. at 203-05.

(2)

Petitioner's second allegation is that Jacobs advised him not to seek cooperation with the government. This allegation, he claims, is confirmed by Jacobs' statements ***258** during trial. During Jacobs' direct examination of petitioner, Jacobs elicited from petitioner the testimony that his attorney had advised petitioner not to cooperate with the government. Trial Tr. at 328. Later, at sidebar while discussing the

relevance of this testimony, Jacobs directly told this court that he was the attorney who had given petitioner this advice. Id. at 334.

This argument standing alone is unconvincing. Jacobs testified at the hearing that he advised petitioner that AUSA Holton would never agree to cooperation unless petitioner was prepared to admit his guilt. Holton has confirmed this. Jacobs further testified that he did explore the possibility of cooperation with petitioner, but that petitioner vigorously asserted his innocence. Therefore, faced with petitioner's claim of innocence, it would be reasonable for Jacobs to advise petitioner that cooperation was not an option for that reason. Since there is no claim that Jacobs advised petitioner not to admit guilt, Jacobs' testimony at the § 2255 hearing that he never advised petitioner against cooperation need not be construed as contradictory. Jacobs' purpose at trial, in eliciting the claim that petitioner's attorney had advised him against cooperation, was to counter any negative inference that the jury might draw from petitioner's failure to cooperate. One need read no more into Jacobs' remark, uttered as it was in the context of advocacy.

Of course, it may be that, considering that often guilty clients initially claim innocence to their lawyers, Jacobs was too quick to accept petitioner's assertions and ought to have pressed petitioner further on the subject. However, the strength of such an argument would depend on the plausibility

of petitioner's tale in light of the evidence against him. To the extent that any weight may be given to this possibility, it tends to merge with petitioner's third allegation.

(3)

A third element of petitioner's claim, essentially, is that Jacobs misled him by providing an unreasonably optimistic estimate of his chances of acquittal. Specifically, petitioner claims his trial attorney told him the case was "winnable," that the government had charged him under the wrong statute and that he should have been charged with Ecstasy. Pet'r's Mem. in Supp. of Mot. at 1, 2; Pet'r's Post-Hr'g Submission at 1; Hr'g Tr. at 14-15, 17, 40-41; see also Declaration of Douglas Pitcher at ¶ 7 ("Mr. Jacobs [said] that he believed we would win at trial, and that therefore I should go to trial").

Jacobs has confirmed that his estimate was very optimistic. He urged petitioner to consider cooperation, but at some point ceased these efforts after he became convinced, based on his assessment of the tape and other evidence, that petitioner was innocent and that the jury would acquit. See, e.g., Hr'g Tr. at 58-59, 63, 68. These admissions adequately confirm petitioner's claims that such optimistic assessments were communicated to him directly.[FN12]

FN12. Jacobs never explicitly confirmed that he communicated such an assessment to

> petitioner, and seems not to have had a sufficiently clear memory of his conversations with petitioner to provide anything more precise. See, e.g., Hr'g Tr. at 59.

Jacobs' optimism regarding petitioner's trial prospects was based on two distinct assessments. First, he believed that petitioner's version of events, as distinct from that provided by Collins, was credible: "I thought the jury was going to acquit him. I thought the tape supported his statements." Hr'g Tr. at 63. Second, he believed that even if the jury believed Collins the evidence was still not sufficient to establish that petitioner had the necessary state of mind to commit the crimes charged, because it showed that petitioner, like Collins, believed the ingredient being imported was not a controlled substance. The recording of the conversation of March 12 played a major role in both assessments: "the transcript was about as strong a piece of evidence as I've seen in years in the drug cases. I thought he could be acquitted on that." Hr'g Tr. at 72.

With regard to the first aspect of Jacobs' assessment, it is impossible to agree that the tape supported petitioner's version of events rather than that of Collins. The tape was highly inculpatory. It confirmed major aspects of Collins' story, which Collins had already provided to law enforcement authorities before the tape was made. It confirmed that petitioner had introduced Collins to Mauricio at petitioner's house and that petitioner's "girlfriend"

had also made such a trip for Saenz. It showed that petitioner was closely involved with Saenz and was generally familiar-more so than Collins-with the world of illicit drugs, that petitioner knew Saenz was a drug dealer and had traveled with him and that petitioner had lent Saenz his beeper so he could contact him, whereupon Saenz would call petitioner from payphones.

The tape is "exculpatory" only in the sense that it was consistent with aspects of petitioner's self-serving account. Its reference to an argument with Saenz is roughly consistent with petitioner's claim that he argued against the trip. Yet to say this is only to give petitioner credit for some creative guile. Petitioner knew what was on the tape, and what Collins' story was, long before he testified at trial, and (most likely) long before he gave any detailed account to Jacobs. But petitioner, unlike Collins, could have concocted his account in its entirety after he knew what was on the tape. For all a jury would know, petitioner could have concocted his story on the eve of trial. Therefore, a rational juror would not have treated the tape as an independent confirmation of petitioner's tale.

It requires little creative skill to weave a few true facts into a work of fiction. All the tape truly established on this point was that petitioner and Saenz had an argument, which can hardly be an unusual event among criminal co-conspirators. Even if one credits self-exculpatory statements petitioner

made on the tape (ignoring petitioner's awareness that the call might be monitored) it establishes only that he did not want to become "involved" himself, not that he opposed Collins' involvement. Indeed, the tension between his desire to avoid personal involvement and his desire to assist Saenz provides the motive for recruiting Collins. The tape is "exculpatory" in the limited sense that it does not literally amount to an explicit confession. However, one does not ordinarily expect explicit confessions from drug dealers when using telephones, especially where, as here, petitioner was aware of the likelihood that the call was being monitored.[FN13]

> FN13. Indeed, in light of the fact that petitioner expressed an awareness that the line was probably being monitored, it is surprising that the tape is as incriminating as it is.

This aspect of Jacobs' assessment is so unconvincing that, notwithstanding his assertions that he believed petitioner, it is hard to believe he gave it much weight.[FN14] This is supported by Jacobs' comment, at the April 14, 1999 status conference, that "[h]ad the defendant acknowledged that he knew it was a narcotic drug, which is my whole defense here, that it was so-called Ecstasy, I would have tried to negotiate." Tr. of 4/14/99 Status Conf. at 24. It is necessary, therefore, to address this second aspect of Jacobs assessment.

> FN14. If Jacobs truly had confidence that his

> client's account was truthful, it is hard to understand why he did not call petitioner's girlfriend, Maureen Killemet, to verify petitioner's version of events and to contradict that of Collins, since she was present, or alleged to have been present, during so many of the contested interactions.

Jacobs believed that, even if one were to credit Collins, there was still insufficient evidence to prove that petitioner knew that the scheme involved the importation a controlled substance, as was arguably required. Cf. United States v. Morales, 577 F.2d 769, 776 (2d Cir.1978) ("[a] defendant need not know the exact nature of a drug in his possession to violate § 841(a)(1); it is sufficient that he be aware that he possesses some controlled substance.") But Jacobs apparently also believed such reasoning applied even to the conspiracy to possess, it apparently not having occurred to him that the possession and distribution of Ecstasy itself (as opposed to a chemical ingredient thereof) was unquestionably the ultimate goal. At trial, Jacobs prevailed in his argument that a jury instruction reasonably compatible with this view be given, at least with regard to the conspiracy to import. The jury was instructed that a chemical ingredient for the manufacture of Ecstasy was not itself a controlled substance.

Nonetheless, Jacobs was not able to keep any of the charges from going to the jury. There was easily adequate evidence from which the jury could infer

knowledge, most of which was known to Jacobs prior to trial. It almost defies belief that an adult would not realize that, if a drug dealer pays someone $5,000.00 plus travel expenses for a trip to South America to smuggle back a chemical substance, he would not realize that it was at least highly likely that the substance was an illegal drug. This alone, together with the inevitable conscious avoidance instruction, was a sufficient basis to submit the case the jury and secure a conviction. But even if one could believe that Collins was this naive,[FN15] there was evidence, known to Jacobs before trial, from which a jury could infer that petitioner was more savvy than Collins about the drug business. Petitioner had a prior conviction for possessing Ecstasy pills in quantities consistent with distribution and was more likely to be aware that $5,000 plus travel expenses is rather much for the importation of a mere chemical ingredient. The tape also establishes that petitioner knew that Collins had a friend who had become a heroin addict, whereas Mauricio did not know Collins at all. It was petitioner, not Mauricio, who knew that Collins would need to be deceived in order to convince him to import heroin.

> FN15. In fact, Collins never actually claimed he was naive enough to believe he was not importing a drug. He merely claimed not to know the drug was heroin. In fact, in his plea allocution, Collins admitted he *did* know he was importing an illicit drug. Collins' failure to challenge petitioner's story that the substance was a mere "chemical ingredient" need not be

construed as contradicting his plea allocution that he realized he would be importing a drug, and Collins himself saw no contradiction. See Trial Tr. at 169-72.

This defense, to the extent that it is independent of petitioner's actual story, is rather technical in the sense that its main thrust is not that petitioner was innocent, but rather that he was incorrectly indicted for conspiracy to import heroin as opposed to a conspiracy to import some non-drug chemical. It assumes, for purposes of argument, that petitioner may in fact be guilty of a conspiracy to import some sort of chemical ingredient, but not of a conspiracy to import drugs.

A critical weakness of this defense is, however, that it does not work for the other conspiracy with which petitioner was charged-the conspiracy to possess heroin with intent to distribute under 21 U.S.C. §§ 846, 841. Collins' testimony, corroborated by the tape, unquestionably establishes that the ultimate aim of the conspiracy was the possession of Ecstasy with intent to distribute. Since Ecstasy is a Schedule I controlled substance, such a state of mind would suffice for conviction for conspiracy to possess heroin with intent to distribute under Morales.

Having thus established a conspiracy to possess a controlled substance under Morales, the substantive charge of importing heroin could then be established under the Pinkerton doctrine, which permits a jury to

convict a defendant of a substantive offense if the jury finds: (1) he was a member of a conspiracy; (2) another member of the conspiracy actually committed the substantive offense; (3) commission of the substantive offense was in furtherance of the conspiracy; and (4) the defendant in question reasonably could have foreseen that the substantive offense would be committed. Pinkerton v. United States, 328 U.S. 640, 645-48, 66 S.Ct. 1180, 90 L.Ed. 1489 (1946). The standard of reasonable foreseeability, less than actual knowledge, would easily have been met under the circumstance of this case. In the instant trial, ultimately a Pinkerton instruction given to the jury, but it is hardly clear that a different decision would have been incorrect.[FN16]

> FN16. In fact, this court's decision at trial was based on an understanding, possibly incorrect in light of the above, that the government was trying to base its Pinkerton argument on a unindicted conspiracy.

It may be assumed, for purposes of this decision, that Jacobs' confidence in his interpretation of Morales was reasonable as applied to the importation conspiracy. However, this defense-that petitioner thought the object of the conspiracy was the importation of a non-drug chemical-was relevant to only one (or at most two) of the three charges. At trial, it was an argument worth making to the court, and perhaps even to the jury. Nonetheless, in a case where all sentences would be concurrent, it should have

played hardly any role in the decision to take the case to trial.

Moreover, petitioner's defenses worked against one another. Petitioner, faced with the problem of explaining why he made so many phone calls to Collins in the weeks before the trip, explained in his trial testimony was that he was calling Collins to talk him out of going. Yet petitioner himself was a dealer in marijuana with a prior conviction for possession of about $2,000 worth of Ecstasy. It is hard to explain why petitioner would be so zealous to dissuade Collins, unless petitioner knew the matter to be far more serious than the sort of illegal conduct he himself customarily engaged in.

There can be no conclusion from the above other than that Jacobs' optimistic assessment of petitioner's chances of victory at trial was unjustified, and it may fairly be inferred that such assessment was communicated to petitioner, as petitioner alleges. However, it is not enough to say, in hindsight, that Jacobs made an error in judgment. Rather, it must be shown that in light of the totality of the circumstances the error was unreasonable given the standards of the profession.

In the context of this particular inquiry, petitioner's protestations of innocence have minimal relevance. Any experienced defense attorney knows that guilty defendants often insist on their innocence to their counsel. Furthermore, even an innocent

defendant is entitled to an assessment that does not mislead him as to the current strength of his case and the threat of conviction. More significant factors are the relative importance of counsel's performance and the time pressures involved. An error in judgment made under pressure of time or when the stakes are low is entitled to more deference than one regarding a critical high-stakes decision where the attorney has had weeks to prepare. "[T]he decision whether to plead guilty or to contest a criminal charge is ordinarily the most important single decision in a criminal case ... [and] counsel may and must give the client the benefit of counsel's professional advice on this critical decision." Gordon, 156 F.3d at 380; Boria, 99 F.3d at 496-97 (quoting Anthony G. Amsterdam, Trial Manual 5 for the Defense of Criminal Cases (1988)). "[K]nowledge of the comparative sentence exposure between standing trial and accepting a plea offer will often be crucial to the decision whether to plead guilty." Gordon, 156 F.3d at 380 (citing United States v. Day, 969 F.2d 39, 43 (3d Cir.1992)). Jacobs had many weeks, if not months, to assess the strength of the case against petitioner and the impact of the tape. Moreover, the stakes were enormous. The government was eager for petitioner's cooperation, and in light of his minor role in the conspiracy, he had an excellent chance of doing little or no jail time if he cooperated. In contrast, petitioner, if convicted after trial, faced a minimum of ten years. Under these circumstances, there appears to be no reasonable basis upon which a competent defense attorney would have reached the conclusion that

petitioner had a "winnable" case, or that the tape was exculpatory as to the conspiracy to possess a controlled substance. Jacobs' advice to petitioner was a constitutionally deficient performance.

(4)

To establish prejudice, petitioner must "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694, 104 S.Ct. 2052; see also Mask v. McGinnis, 233 F.3d 132, 140 (2d Cir.2000) (petitioner need only show that but for counsel's errors there was a reasonable probability that the result of the plea bargaining process would have been different). Once such a showing is made, the claim is not defeated by a showing that counsel provided competent representation in a more general sense. See Henry v. Poole, ___ F.3d ___, 2005 WL 1220468 (2d Cir. May 24, 2005) (holding that a state court unreasonably applied Strickland when it avoided addressing the probable impact of counsel's unprofessional errors based on of a finding that counsel provided "meaningful representation" overall).

As applied here, the question is whether there is a reasonable likelihood that petitioner would have elected to cooperate had he received reasonable advice as to the strength of the case against him. Petitioner's protestations of innocence need not be construed as proof that petitioner would not have cooperated. See

Mask, 233 F.3d at 141; Cullen, 194 F.3d at 407. There can be little doubt that the standard for prejudice is met. It is uncontested that petitioner was willing to cooperate at least to the extent that he was willing to provide information against Saenz. This is consistent with what he told Jacobs, with what he told Agent Tsang, and with his willingness to provide information to Collins on the tape. His hesitancy was apparently motivated by a desire, which would ordinarily have been prudent, to check with an attorney before weighing his options. Naturally he hoped, if possible, to avoid conviction altogether, and thereby prevent his family from learning of his new drug-related troubles. But there is no reason to assume he would not have reconsidered had he been given competent advice. Although he did lie to his attorney, there is no basis for assuming he would have stuck to this story if Jacobs had provided reasonable advice concerning the serious danger of conviction and the comparative advantages of cooperation. Jacobs, by unreasonably telling petitioner that his story was a good one, that the tape supported his innocence claim and that the government's case was weak, gave petitioner precious little incentive to say anything else.

(5)

Respondent, however, argues that the Second Circuit has essentially rejected those claims, which cannot be heard anew in this petition. It is well settled that petitioner may not employ a § 2255

petition to relitigate claims already raised and considered in a prior § 2255 petition or on direct appeal. Riascos-Prado v. United States, 66 F.3d 30, 33 (2d Cir.1995); Williams v. United States, 731 F.2d 138, 141 (2d Cir.1984), cert. denied,469 U.S. 1188, 105 S.Ct. 956, 83 L.Ed.2d 963 (1985). See also United States v. Sanin, 252 F.3d 79, 83 (2d Cir.2001); Cabrera v. United States, 972 F.2d 23, 25 (2d Cir.1992). Reconsideration is permitted only where there has been an intervening change in the law and the new law would have exonerated a defendant had it been in force before the conviction was confirmed on direct appeal. Chin v. United States, 622 F.2d 1090, 1092 (2d Cir.1980). Petitioner makes no claim of any intervening change in the law applicable here, so it only remains to be determined if the grounds upon which petitioner currently claims relief are the same grounds that were already raised and considered on direct appeal.

Additionally, a defendant who fails to raise a claim on direct appeal generally is barred from advancing it in a subsequent § 2255 petition unless he can show cause for his procedural default and actual prejudice resulting from the error. However, this rule, articulated in Campino v. United States, 968 F.2d 187, 190 (2d Cir.1992), no longer applies to claims of ineffective assistance of counsel. As the Supreme Court recently held, such a claim may be raised in a subsequent § 2255 motion regardless of whether such a claim could have been raised earlier on appeal. Massaro v. United States, 538 U.S. 500, 123 S.Ct.

1690, 155 L.Ed.2d 714 (2003).

Prior to the Supreme Court's decision in Massaro, the Second Circuit had adopted a more limited exception to the Campino rule, holding that it would still apply to bar claims of ineffective assistance of counsel in cases where "(1) the petitioner was represented by new appellate counsel on direct appeal, and (2) the claim is based solely on the record developed at trial." Billy-Eko v. United States, 8 F.3d 111, 115 (2d Cir.1993).

The Billy-Eko rule created a dilemma for appellate counsel who fell within its scope. See Massaro, 538 U.S. at 506-507, 123 S.Ct. 1690. On the one hand, the rules of Campino and Billy-Eko obliged them to raise any ineffectiveness claims that were fully supported by the record. On the other hand, any ineffectiveness claims brought as part of a § 2255 motion sharing the same "legal ground" as those raised on direct review would be barred under Williams. See Williams, 731 F.2d at 141 (distinguishing claims based on new legal grounds, which are not barred, from new factual arguments in support of a ground previously raised, which are barred).

In an attempt to resolve the tension created by this "legal quandry," the Second Circuit held in Riascos-Prado that whenever the procedural rules of Billy-Eko would lead to different results for related claims, those claims would be treated as though they

were different "grounds" for purposes of the Williams rule. 66 F.3d at 35. Indeed, Riascos-Prado provides the appropriate framework to analyze this petition.

When petitioner brought his direct appeal in the instant case, he was represented by Kellman as new appellate counsel. Kellman was, therefore, obliged under Billy-Eko to raise on appeal claims of ineffectiveness that were supported by the record below. The claims she did raise were in fact squarely based upon statements that Jacobs made on the record. However, Riascos-Prado makes clear that petitioner cannot now be barred from raising ineffectiveness claims that could not be supported by the record below at the time of his direct appeal.

Petitioner's current claim is that Jacobs misled petitioner by providing an unreasonably optimistic assessment of his chances of acquittal following trial. The specific claim was not raised in any of the appellate or pro se supplemental briefs presented in the Second Circuit. Importantly, it could not have been raised without an opportunity to gather evidence regarding the bases of Jacobs' assessment, which could only take place, and did only take place, in conjunction with the instant habeas petition.

There appears to be no principled basis for distinguishing the instant claim from that which was held not to be barred in Riascos-Prado. There, one of Riascos-Prado's previously-litigated claims had been that counsel failed to explain to Riascos-Prado the

consequences of his guilty plea. 66 F.3d at 32. The subsequent § 2255 claim, held not to be barred, was that a conflict of interest had prompted counsel to advise Riascos-Prado to plead guilty. Id. at 33. That the two claims were intimately interrelated was clearly not determinative.

Another subsequent claim by Riascos-Prado, which *was* held to be barred, was that counsel did not explain the sentencing guidelines to Riascos-Prado at any time prior to the entry of his guilty plea. *Id.* This was held to be "a slightly altered rearticulation of the claim that was rejected on direct appeal." Id. at 35. It does not appear that the same can be said here. Petitioner's current claim is analytically distinct from those raised on appeal, and can be recognized as meritorious without finding any fault with the logic or specific findings of the Second Circuit. For instance, the Second Circuit's conclusion that the advice challenged as ineffective (including the advice against cooperation) resulted from petitioner's decision to deceive his attorney is entirely consistent with the analysis presented here.

This claim, consequently, equally constitutes a separate "ground" as the conflict-of-interest claim at issue in Riascos-Prado. Moreover, in light of the Second Circuit's policy, in effect before Massaro, of declining to review ineffectiveness claims that would more properly be addressed in a § 2255 petition, there is a presumption that the Second Circuit did not intend to resolve or foreclose any

questions besides those specifically raised. See United States v. Salameh, 152 F.3d 88, 160-61 (2d Cir.1998) ("it must be remembered that the Billy-Eko doctrine is discretionary, and, given the baseline aversion to resolving ineffectiveness claims on direct review ... it should not be invoked lightly."); see also United States v. Gaskin, 364 F.3d 438, 467-68 (2d Cir.2004); United States v. Morris, 350 F.3d 32, 39 (2d. Cir.2003). In light of these considerations, it appears that no procedural bar forbids addressing the merits and granting relief.

(6)

Where there has been a finding of ineffective assistance of counsel on a § 2255 proceeding, the remedy "should be tailored to the injury suffered from the constitutional violation and should not unnecessarily impinge on competing interests." United States v. Morrison, 449 U.S. 361, 364, 101 S.Ct. 665, 66 L.Ed.2d 564 (1981); Gordon, 156 F.3d at 381. Such competing interests include the necessity of preserving society's interest in the administration of criminal justice. Id. Petitioner has already served more than six years of his ten-year sentence, certainly far more time than he would have served under a cooperation agreement with the government. Under these circumstances, the appropriate remedy is to grant the relief requested and resentence petitioner to time served, without disturbing the judgment of conviction. See Boria, 99 F.3d at 499.

Conclusion

For the foregoing reasons, the petition is granted. Petitioner's sentences are hereby vacated as to all three counts of conviction. Petitioner is hereby resentenced to time served as to all three counts of conviction. Petitioner is to be discharged, but the judgment of conviction is not disturbed.

The clerk of the Court is directed to close this case.

SO ORDERED:

/s/
David G. Trager
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS OF THE SECOND CIRCUIT

Argued: November 20, 2000
Decided: April 10, 2001

Docket No. 00-1222

United States of America,
Appellee

v.

Douglas Pitcher,
Defendant-Appellant.

BEFORE: OAKES, JACOBS, PARKER,
Circuit Judges

Douglas Pitcher challenges his conviction and sentence in the United States District Court for the Eastern District of New York for conspiracy to import heroin (21 U.S.C. § 963), conspiracy to possess heroin with intent to distribute (21 U.S.C. § 846), and importing heroin (21 U.S.C. § 952).

On appeal, Pitcher admits his participation in these offenses but argues that: 1) he would have pursued a cooperation agreement but for the ineffectiveness of his counsel; 2) counsel should have sought a special verdict concerning Pitcher's intent; and 3) the sentence should have been the statutory minimum based on the quantity of narcotics foreseeable by Pitcher.

1. Plea Negotiations. The government "was interested in trying to sign [Pitcher] up as a cooperator from the beginning, and [this] was made clear to the defendant at the moment of his arrest;" but Pitcher proceeded to trial because, in his words, he "didn't think [he] was guilty" and "thought [he] had a good chance of winning." Any deficiency in counsel's advice on this subject is properly attributable to Pitcher's own dishonesty in dealing with his lawyer; Pitcher's counsel admitted that, "Had [he] realized ... the truth of what had actually occurred here before we went to trial, [he] never would have went to trial." See, e.g., Tyson v. Keane, 159 F.3d 732, 736-37 (2d Cir.1998) (holding that, absent a gross failure to investigate defendant's claims, it is not ineffective counsel to rely on defendant's apparently truthful statements when determining trial strategy).

2. Special Verdict Form. At trial, Pitcher claimed that he thought the objective of the conspiracy was to import a chemical used in the production of Ecstasy, not to import heroin. (Pitcher has since admitted that this was perjury, and now claims that he thought the imported drug would be

cocaine.) Pitcher claims that his trial counsel should have requested a special verdict asking the jury to identify which drug Pitcher believed to be involved in the conspiracy.

The government needed to prove only that: i) the drug imported was heroin and ii) the defendant had the intent to import any controlled substance. *See* United States v. Obi, 947 F.2d 1031, 1032 (2d Cir.1991) (per curiam) (holding that defendant's claim that he thought he was importing cocaine when he was actually importing heroin was irrelevant); United States v. Collado-Gomez, 834 F.2d 280, 280-81 (2d Cir.1987) (per curiam) (holding enhanced penalty for possession of crack is applicable whether or not defendant knew the nature of the controlled substance). Pitcher does not dispute that the drug actually imported was heroin. At every relevant point, the charge properly advised that the jury needed to find that the conspiracy involved "heroin or any other controlled substance." The special verdict Pitcher seeks would have been irrelevant.

3. *Sentencing.* Pitcher argues that, because of his minimal involvement in the conspiracy and his belief that narcotics other than heroin were involved, the court should have sentenced him on the basis of the lowest quantity of narcotics in the Sentencing Guidelines' Drug Quantity Table. The Pitcher relies on United States v. Chalarca, 95 F.3d 239, 242 (2d Cir.1996), in which this Court upheld a district court's decision to set the defendant's "offense level at the level representing the least amount of cocaine that

appears in the Drug Quantity Table in the Sentencing Guidelines," as opposed to the level representing the amount actually involved in the crime.

Chalarca was based on the district court's finding that, although Chalarca conspired to distribute cocaine (and possess with intent to distribute), and "was at the scene of a drug transaction that was in progress ..., he had no knowledge of what was taking place there." Id. at 244, 245. Pitcher's case can be distinguished from Chalarca because Pitcher recruited the courier, helped him obtain a passport, and drove him to the airport.[FN1] Pitcher knew that the conspiracy involved narcotics, and helped convince the courier that the drug was Ecstasy, a narcotic that then carried comparatively moderate penalties. The district court's decision to take the entire amount of the heroin involved in Pitcher's crime into account was proper. See id. at 243 ("[T]he quantity of drugs attributed to a defendant need not be foreseeable to him when he personally participates, in a direct way, in a jointly undertaken drug transaction.").

> FN1. For instance, in Chalarca we distinguished United States v. Lockhart, 37 F.3d 1451, 1454 (10th Cir.1994), a case in which the defendant "drove the car ... to facilitate the transaction" and "knew that the purpose of the trip was to obtain cocaine," and suggested that, in those circumstances, departure from the sentencing guidelines

would be reversible error. Chalarca, 95 F.3d at 243-44.

To support his claim that the sentencing judge should have treated his offenses as though they involved the minimum quantity of narcotics, Pitcher also relies on Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), which holds that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Id. at 2362-63. Pitcher was sentenced under 21 U.S.C. § 960(b)(1) for importing more than one kilogram of heroin, which carries a statutory range of ten years to life in prison. If the quantity of heroin had not been taken into account, Pitcher would have been sentenced instead under § 960(b)(3), which carries a maximum of twenty years imprisonment, with no minimum. Pitcher was sentenced chiefly to 121 months imprisonment, the bottom of the applicable Sentencing Guidelines range. Because Pitcher was sentenced below the statutory maximum and because his sentence was not affected by the statutory minimum, Apprendi does not apply. See United States v. Garcia, 240 F.3d 180, 183-84 (2d Cir.2001).

Pitcher has also submitted several pro se supplemental briefs. We have reviewed the arguments contained therein and find them without merit.

For the reasons set forth above, the judgment of the district court is hereby AFFIRMED